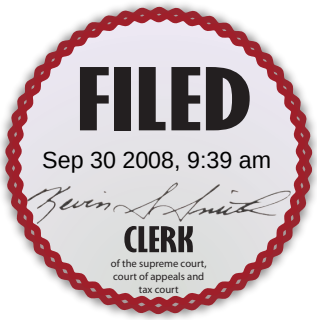

ATTORNEY FOR APPELLANT:

TAFFANEE L. KEYS
Hansen Law Firm, LLC
Fishers, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EDWIN THOMAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0708-CR-740
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0302-FA-71

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Edwin Thomas appeals the sentence imposed, after remand, on his convictions of five counts of class A felony child molesting; six counts of class C felony child molesting; and two counts of engaging in a performance harmful to minors, as class D felonies.

We reverse in part and remand.

ISSUE

Whether the sentence imposed is inappropriate.

FACTS

A panel of this court previously stated the facts and procedural history as follows:

> On February 19, 2003, the State filed a charging information alleging that Thomas committed sixteen counts of child molesting as a Class A felony, ten counts of child molesting as a Class C felony, and three counts of performance before a minor that is harmful to minors as a Class D felony. The State alleged that each of these offenses were committed upon Thomas' stepson, D.N., who was born in 1991. Each of the sixteen counts of child molesting as a Class A felony read as follows:
>
> On or between September 1997 and December 2001, [Thomas], a person of at least twenty-one (21) years of age, to-wit: between the ages of twenty-five (25) and twenty-nine (29) did perform or submit to sexual intercourse or deviate sexual conduct with [D.N.], a child under the age of fourteen (14) years, to-wit: between the ages of six (6) and ten (10) years of age.
>
> Eight of the ten counts of child molesting as a Class C felony were worded exactly the same and read:
>
> > On or between September, 1997 and December 2001, [Thomas] did perform or submit to fondling or touching with [D.N.], a child under the age of fourteen years, to-wit: between the ages of six (6) and ten (10) years of age, with the intent to arouse or satisfy the sexual desires of [Thomas] and/or [D.N.].
>
> In the two Class C felony counts that were not worded the same, the State alleged that Thomas fondled D.N. while he was between the ages of five and six. Two of the three counts of performance before a minor that is

harmful to minors were worded the same and alleged that Thomas committed this offense by displaying and reviewing pornography via a computer before D.N. The third Class D felony count alleged that Thomas displayed and reviewed videotaped pornography before D.N.

Thomas' jury trial began on May 5, 2004. D.N. testified during the trial and began by recounting two incidents that occurred when he was five-years-old. The first incident involved Thomas fondling D.N. at a house located on Fourth Street in Sheridan, Indiana, while the second incident concerned Thomas fondling D.N. at the Sheridan Motel. Thomas objected to this testimony arguing that the crimes charged against him allegedly occurred while D.N. was between the ages of six and ten, and that this testimony was outside the relevant timeframe. The trial court overruled Thomas' objection.

D.N. went on to testify about several incidents with Thomas that occurred after he turned six-years-old. These incidents principally took place at two different locations, a house located on Georgia Street in Sheridan and a house located on Hannibal Street in Noblesville, Indiana. The first incident D.N. remembered occurring at the house on Georgia Street involved Thomas fondling his penis. In a second incident, Thomas fondled D.N.'s penis and then put his penis in D.N.'s mouth. During a third incident at the Georgia Street residence, Thomas made D.N. watch a pornographic videotape that showed a man and a woman having sex. Thomas then had D.N. get down on the floor, and he inserted his penis into D.N.'s anus. After sodomizing D.N., Thomas put his penis in D.N.'s mouth and ejaculated.

D.N. then proceeded to describe several incidents that occurred at the Hannibal Street residence. The first incident D.N. recalled occurred in the living room of the Hannibal Street residence. D.N. stated that Thomas fondled D.N.'s penis and then sodomized D.N. After this, Thomas had D.N. fondle his penis. D.N. then described a second incident that occurred in Thomas' office at the Hannibal Street house. D.N. related that Thomas turned on his computer and showed him some pictures of naked men and women having sex. Thomas then told D.N. to lie down on the floor, and he sodomized D.N. During a third incident at the Hannibal Street residence, D.N. testified that Thomas made him go into a bedroom where he fondled D.N.'s penis and then made D.N. fondle his penis.

After presenting its case in chief, the State filed a motion to dismiss four of the Class A felony counts and four of the Class C felony counts. The trial court granted the State's motion. Thomas then made a motion to dismiss all but four of the remaining counts, arguing that the remaining counts as charged violated his right to be free from double jeopardy under Article I, Section 14 of the Indiana Constitution. The trial court denied Thomas' motion. The State made a motion to amend the charging

information, which the trial court granted over Thomas' objection. After a recess, the State submitted an amended information. The amended information charged Thomas with twelve counts of child molesting as a Class A felony, six counts of child molesting as a Class C felony, and three counts of performance before a minor that is harmful to minors as a Class D felony. The State orally moved to dismiss one of the Class D felony counts, and the trial court granted the motion. Thomas then made a motion for a mistrial arguing that he was prejudiced by the amendment of the charging information and by the State's introduction of evidence occurring prior to the dates listed on the charging information, namely those incidents occurring before D.N. was six-years-old. The trial court denied Thomas' motion for a mistrial.

The State's amended information was sent to the jury in the form of final jury instruction number twelve, ...

* * *

The jury found Thomas not guilty of six counts of child molesting as a Class A felony, but guilty of six counts of child molesting as Class A felonies; six counts of child molesting as Class C felonies, and two counts of performances before a minor that is harmful to a minor as Class D felonies.

The trial court held a sentencing hearing on November 15, 2004. The court found the presence of two aggravating circumstances. The first aggravator found by the court was Thomas' criminal history, which included two convictions for operating a motor vehicle while intoxicated as a Class A misdemeanor and one conviction for battery as a Class B misdemeanor. The court also noted that while Thomas was incarcerated for the instant offense he had attempted to hire another inmate to murder D.N. and was now facing charges of conspiracy to commit murder. The second aggravator found by the court was that Thomas "regularly and frequently stood in loco parentis to the victim in this case." The court specified that "[t]he factual evidence in this case is that you [Thomas] routinely provided care for the victim in this case in a parental capacity including transportation." The court found no mitigating factors. Relying upon the aggravating factors it found, the trial court ordered Thomas to serve enhanced sentences of forty years for each of his six Class A felony child molesting convictions, six years for each of his six Class C felony child molesting convictions, and three years for his two Class D felony convictions for performance before a minor that is harmful to minors. The trial court specified that the Class A felony convictions should be served consecutively, that the Class C felony convictions should be served consecutively to one another but concurrently with the sentences for the Class A felonies, and that the Class D felony convictions should be served consecutively to one another and to the Class A felony sentences. The

> trial court suspended Thomas' sentences for his Class D felonies to probation, leaving him with an executed sentence of two hundred and forty years.

Thomas v. State, 840 N.E.2d 893, 896-900 (Ind. Ct. App. 2006) (internal citations omitted) ("*Thomas I*"), *trans. denied*.

Thomas appealed, arguing that several of his convictions violated his right to be free from double jeopardy; that his motion for a mistrial was improperly denied; and that his sentence was improper. We vacated one of the Class A felony convictions, based on a violation of the Double Jeopardy Clause of the Indiana Constitution. We affirmed the trial court's denial of his motion for a mistrial. With respect to the sentence imposed, we first found that pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court erred in finding "that Thomas stood *in loco parentis* to D.N." as an aggravating factor "because the jury did not find and Thomas did not admit that he was in a position of trust." *Thomas I*, 840 N.E.2d at 903. We then found that the trial court "correctly concluded" that the remaining single aggravating factor of Thomas' criminal history "was not entitled to substantial weight." *Id.* at 904. Accordingly, we held that the "trial court erred in enhancing Thomas' sentences" and remanded for the trial court to "reduce each of Thomas' sentences to the presumptive sentence."[1] *Id.*

[1] Thomas committed his crimes and was sentenced prior to April 25, 2005, when the General Assembly implemented a new sentencing scheme in Indiana. Indiana's sentencing scheme was amended to incorporate advisory sentences rather than presumptive sentences and to comply with the holdings in *Blakely* and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). *See* Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Accordingly, the sentencing scheme previously in place, dealing with presumptive as opposed to advisory sentences, is applicable here. *Monroe v. State*, 886 N.E.2d 578, 579 (Ind. 2008).

On August 21, 2006, the trial court conducted a hearing to modify Thomas' sentence in accordance with *Thomas I*. The trial court expressly incorporated its earlier (November 16, 2004) sentencing proceedings. Neither Thomas nor the State presented any additional evidence. Counsel for Thomas argued that the trial court should order that the presumptive sentences "run concurrent." (Tr. 6). The State noted that *Thomas I* "indicated no concern" regarding the trial court's previous order that the sentences be consecutive, and urged the trial court to order the "sentences to run consecutively." *Id.* The trial court found *Thomas I* provided no guidance in that regard but simply instructed it to re-sentence Thomas "on all counts with the presumptive sentence." (Tr. 14).

The trial court then ordered Thomas to serve thirty-year sentences for each of the five class A felony convictions[2]; four-year sentences for each of the six class C felony convictions[3]; and one and one-half years for each of the two class D felony convictions.[4] It further ordered that the class A felony sentences be served consecutively but concurrent with the class C felony sentences, which class C felony sentences were to be served consecutive to one another. The class D felony sentences were ordered to be served consecutive to one another and to the other sentences. The trial court imposed an aggregate sentence of 153 years, with 150 years to be executed.

DECISION

---

[2] *See* Ind. Code § 35-50-2-4.

[3] *See* I.C. § 35-50-2-6.

[4] *See* I.C. § 35-50-2-7.

Sentencing decisions rest within the sound discretion of the trial court, and we review these decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218. The trial court's wide discretion in sentencing extends to the determination of whether to increase presumptive penalties, impose consecutive sentences on multiple convictions, or both. *Davies v. State*, 730 N.E.2d 726, 741 (Ind. Ct. App. 2000).

As noted above, at the re-sentencing hearing, the trial court and the parties questioned the meaning of *Thomas I* – whether its mandate was to simply take the previous sentencing order and replace the enhanced sentence terms with the presumptive terms, leaving in place the part of the order that provided for terms to be served consecutively; whether it implicitly directed the trial court to impose presumptive terms that were to be served concurrently; or whether the trial court retained the discretion to order the various terms to be served concurrently or consecutively. As *Thomas I* was decided by another panel, we are unable to shed any light on the quandary.

Thomas had argued in *Thomas I* not only that his sentences for the class A felony offenses should be the presumptive term but also that they should be ordered served concurrently. Therefore, by not addressing the latter, *Thomas I* arguably affirmed that the law would allow those sentences to be served consecutively. Under these circumstances, we are reluctant to hold that the trial court abused its authority by ordering sentences to be served consecutively.

That said, it remains within the authority of this court to review Thomas' sentences pursuant to Indiana Appellate Rule 7(B), as he requests. The Rule implements

the authority granted to appellate courts in the Indiana Constitution. *Anglemyer*, 868 N.E.2d 491. Appellate Rule 7(B) provides that the reviewing court may revise a sentence if it finds "that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.*

As to the nature of the offenses, crimes against children are particularly contemptible. *Monroe v. State*, 886 N.E.2d 586, 580 (Ind. 2008). Thomas repeatedly molested D.N. over a period of more than four years. Still, except for the fact that one count of child molesting as a class A felony offense was alleged to have taken place in a different location than the other four, all were "identical and involved the same child." *Id.* We reach similar conclusions as to Thomas' other offenses against D.N. As to the character of the offender, the fact that Thomas had some previous contact with law enforcement and the court system reflects a less than sterling character, and we assign weight in the low range to this factor. However, Thomas' commission of these offenses upon his stepson is also a reflection of his character. Viewing the foregoing circumstances together, we find that the nature and circumstances of Thomas' repeated child molesting offenses do warrant an aggregate sentence greater than concurrent presumptive terms. However, the aggregate 153-year sentence is effectively a life sentence and should be revised.[5]

[5] Thomas' date of birth is August 13, 1972. According to the Department of Correction, his earliest possible release date is January 21, 2080 – more than seven years after Thomas' 100th birthday.

Consistent with our authority pursuant to Indiana Appellate Rule 7(B), we choose to revise the sentence herein by ordering that Thomas receive the presumptive sentence on all counts, to be served as follows:

- thirty years executed for each of Counts I, II and III, with said counts to be served concurrent with one another;
- thirty years executed for each of Counts V and VI, with said counts to run concurrent with one another, but consecutive to Counts I, II and III;
- four years executed for each of Counts XVII, XVIII and XIX, with said counts to be served concurrent with one another, but consecutive to Counts V and VI;
- four years executed for each of Counts XX, XXI and XXII, with said counts to be served concurrent with one another, but consecutive to Counts XVII, XVIII and XIX;
- one and one-half years executed for each of Counts XXVI and XXII, with said counts to be served concurrent with one another and concurrent with Counts XVII, XVIII, and XIX,

for a total executed sentence of sixty-eight years. *See Monroe,* 886 N.E.2d 586 (aggregate sentence of 100 years for five class A felony offenses revised to aggregate sentence of 50 years); *Smith v. State*, 889 N.E.2d 265 (Ind. 2008) (aggregate sentence of 120 years for four class A felony child molesting offenses revised to aggregate sentence of sixty years).

Reversed and remanded.

NAJAM, J., and BROWN, J., concur.